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8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA  
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11 RED EYED JACKS SPORTS BAR INC.  
12 dba CHEETAH'S NIGHT CLUB,  
13 Plaintiff,  
14 v.  
15 CITY OF SAN DIEGO et al.,  
16 Defendants.

Case No.: 14cv823-L (AGS)

**ORDER (1) GRANTING IN PART  
PLAINITFF'S MOTION TO DENY  
OR RE-TAX COSTS CLERK'S  
TAXATION OF COSTS; (2)  
DENYING DEFENDANTS' MOTION  
TO FILE SUR-REPLY**

17 Pending before the Court are Plaintiff's motion to re-tax costs (doc. no. 99), and  
18 Defendants' motion to file a sur-reply (doc. no. 102). Both motions are opposed. For the  
19 reasons stated below, Plaintiff's motion to re-tax costs is granted in part. Defendants'  
20 motion to file a sur-reply is denied.

21 Plaintiff ("Cheetah's" or Plaintiff) seeks to re-tax costs awarded by the Clerk of  
22 Court to Defendants as prevailing parties. (Doc no. 98.) Defendants applied for  
23 \$63,982.18 in costs, which Plaintiff opposed. The Clerk granted Defendants' application  
24 in part and awarded \$28,461.07. Plaintiff moves to re-tax and requests the Court to deny  
25 Defendants' application in its entirety or, alternatively, to reduce the award to \$936.90.  
26 Defendants filed an opposition with a request that the Court re-tax costs at the original  
27 requested amount of \$63,982.18 and award attorneys' fees.  
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1 Plaintiff argues that no costs should be awarded because Defendants are not  
2 prevailing parties. “Unless a federal statute, [federal] rules, or a court order provides  
3 otherwise, costs – other than attorney’s fees – should be allowed to the prevailing party.”  
4 Fed. R. Civ. P. 54(d)(1). This rule “creates a presumption in favor of awarding costs to a  
5 prevailing party, but vests in the district court discretion to refuse to award costs.” *Assoc.*  
6 *of Mexican-American Educators, v. State of Cal.*, 231 F.3d 572, 591 (9th Cir. 2000) (*en*  
7 *banc*).

8 This action was dismissed with prejudice pursuant to a joint motion under Federal  
9 Rule of Civil Procedure 41(a). (Doc. no. 94.) The parties reserved the issue whether  
10 costs and fees should be awarded to Defendants. (Doc. no. 92.) Usually, when a suit is  
11 voluntarily dismissed with prejudice, it is “tantamount to a judgment on the merits . . . ,  
12 which makes the defendant the prevailing party in the action.” *Zenith Ins. Co. v.*  
13 *Breslaw*, 108 F.3d 205, 207 (9th Cir. 1997), abrogated on other grounds by, *AMAE v.*  
14 *California*, 231 F.3d 572 (9th Cir. 2000). Accordingly, Defendants are prevailing parties.

15 Because Rule 54(d)(1) creates “a presumption for awarding costs to prevailing  
16 parties; the losing party must show why costs should not be awarded.” *Draper v.*  
17 *Rosario*, 836 F.3d 1072, 1087 (9th Cir. 2016) (internal quotation marks and citation  
18 omitted).

19 [A]ppropriate reasons for denying costs include: (1) the substantial public  
20 importance of the case, (2) the closeness and difficulty of the issues in the  
21 case, (3) the chilling effect on future similar actions, (4) the plaintiff’s  
22 limited financial resources, and (5) the economic disparity between the  
23 parties. This is not an exhaustive list . . . , but rather a starting point for  
24 analysis.

24 *Id.* (internal quotation marks and citations omitted). Furthermore, “a losing party need  
25 not demonstrate that all five factors weigh against imposing costs; rather, the list provides  
26 a starting point for analysis.” *Id.* (internal quotation marks and citation omitted).

27 This case arises from two police raids on Cheetah’s, an adult entertainment  
28 establishment in San Diego. The raids were executed ostensibly pursuant to the

1 administrative inspection provision of San Diego Municipal Code § 33.0103. Four  
2 actions were filed in response to the raids. They were consolidated under Federal Rule of  
3 Civil Procedure 42(a) for purposes of discovery and motion practice because of  
4 substantial overlap in factual allegations and legal claims. (*See* doc. no. 42).

5 In this action ("*Cheetah's* case"), Plaintiff alleged § 33.0103 was unconstitutional  
6 under the First, Fourth and Fourteenth Amendments on its face and as applied, and that  
7 unconstitutional conduct during the raids was ratified by the Chief of Police. Pending at  
8 the time of dismissal was Plaintiff's motion to strike parts of its own complaint alleging  
9 the raids damaged its business. (*See* doc. no. 82.) The action was dismissed after a  
10 motion to quash the subpoena of Michael Galardi, filed in a related action, had been  
11 granted in part and denied in part. (*See* 16cv1447, doc. no. 83; *cf.* 14cv823, doc. no. 92.)  
12 Defendants served the subpoena to determine whether Galardi was Plaintiff's owner or  
13 had a financial interest in Plaintiff.

14 In a related case, *Coe v. City of San Diego et al.*, case no. 16cv1447, Suzanne Coe  
15 was alleged to be Plaintiff's owner. She alleged Defendants retaliated against her by  
16 revoking Cheetah's adult entertainment permit because Cheetah's entertainers and  
17 management had complained to the media about the raids and filed lawsuits against  
18 Defendants. She alleged retaliation in violation of the First and Fourteenth Amendments,  
19 among other claims. She dismissed the case one week before dismissal of the *Cheetah's*  
20 case. (16cv1447, doc. no. 87; *cf.* 14cv823, doc. no. 94.) Costs were taxed in favor of  
21 Defendants as prevailing parties. (*See* 16cv1447, doc. no. 93.)

22 Also related are *Doe v. City of San Diego, et al.*, case no. 14cv1941 ("*Doe*"), and  
23 *Tanya A., et al. v. City of San Diego, et al.*, case no. 14cv1942 ("*Tanya A.*"), brought by  
24 approximately thirty entertainers, some from Cheetah's and others from another adult  
25 entertainment establishment. They alleged, among other things, that § 33.0103 was  
26 unconstitutional under the First, Fourth, and Fourteenth Amendments on its face and as  
27 applied, and that they were subject to unlawful search and seizure. *Tanya A.* and *Doe*  
28 cases remain pending.

1 Plaintiff argues that no costs should be awarded to Defendants in *Cheetah's* case  
2 because it bears substantial public importance, the issues were close, the cost award  
3 would have a chilling effect on future similar actions, and because Plaintiff allegedly had  
4 been forced to dismiss the case because Defendants "effectively drove [it] out of  
5 business" by revoking its permit. (Doc. no. 99-1 at 2).

6 Whether the permit revocation was retaliatory was to be litigated in the *Coe* case.  
7 The issue was not resolved, because the case was voluntarily dismissed. The issues of  
8 substantial public importance raised in *Cheetah's* case continue to be vigorously litigated  
9 by other parties in *Doe* and *Tanya A.*<sup>1</sup> Plaintiff does not contend it has insufficient  
10 resources to pay the costs taxed by the Clerk. Based on the foregoing, Plaintiff has not  
11 met its burden of showing why no costs should not be awarded to the prevailing party.  
12 *See Draper*, 836 F.3d at 1087.

13 Alternatively, Plaintiff requests re-taxing of specific costs claimed by Defendants.  
14 The Clerk reduced Defendants' costs from \$63,982.18 to \$28,461.07. Plaintiff argues  
15 that some of those costs were incurred for trial preparation in the *Tanya A.* and *Doe* cases.

16 Relying on *Koch v. Hankins*, 8 F.3d 650 (9th Cir. 1993), Plaintiff argues that to the  
17 extent costs are associated with work that will be useful in *Doe* and *Tanya A.* cases, they  
18 should be wholly excluded from *Cheetah's* case. (Doc. no. 99-1 at 7.) *Koch* is  
19 distinguishable. There, the plaintiff requested dismissal under Rule 41(a)(2), which  
20 requires the court to set terms and conditions of dismissal. *Koch*, 8 F.3d at 652; Fed. R.  
21 Civ. Proc. 41(a)(2). The *Cheetah's* case was dismissed under Rule 41(a)(1)(A), which  
22 does not require an order setting terms and conditions of dismissal. Upon dismissal  
23 under Rule 41(a)(2), where litigation between the parties continues in another forum, the  
24 defendant is entitled only to the costs which are not useful for continuing litigation  
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28 <sup>1</sup> In *Doe* and *Tanya A.* the Court found that § 33.0103 on its face violates the First  
Amendment. (14cv1941, doc. no. 97.)

1 between the parties. Here, litigation does not continue between the same parties, because  
2 the plaintiffs in *Doe* and *Tanya A.* were not parties to the *Cheetah's* case.

3 Plaintiff's reliance on *Koch* to exclude *all* of Defendants' costs for work which may  
4 be used in defending *Doe* and *Tanya A.* cases is therefore unavailing. However,  
5 awarding all of Defendants' costs in *Cheetah's* case, when the work can still be used in  
6 *Doe* and *Tanya A.*, would be inequitable. To the extent the costs were incurred for work  
7 necessary for trial preparation in all three cases, one-third is allocated to *Cheetah's* case.

8 Deposition testimony of adult entertainers who did not perform at *Cheetah's* is not  
9 relevant in *Cheetah's* case, but is relevant in *Tanya A.* Accordingly, \$1,729.10 in costs  
10 for deposition transcripts of Linda E., Brianna H. and Rowsanna M. is excluded.

11 Plaintiff further seeks to exclude the costs for deposing adult entertainers who  
12 performed at *Cheetah's*, because the depositions were noticed in *Tanya A.* and *Doe* cases.  
13 These depositions were necessary to establish what occurred during the raids. Because  
14 *Cheetah's* case as well as *Tanya A.* and *Doe* request a finding that § 33.0103 was  
15 unconstitutional as applied, the testimony was needed to prepare for trial in all three  
16 cases. The same reasoning applies to transcripts for non-appearance at deposition and a  
17 non-appearance fee charged for the deposition of Mariya W. The Court therefore  
18 allocates one-third of entertainer deposition costs to *Cheetah's* case, and excludes  
19 \$10,788.30 from the cost award.<sup>2</sup>

20 Plaintiff also requests exclusion of subpoena costs of \$936.90 for the depositions  
21 of Robert Leslie, Anthony Buonanthony and Barry Bogart, because the depositions can  
22 be used in *Doe* and *Tanya A.* For the reasons stated above, \$624.60 is excluded.

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26 <sup>2</sup> Plaintiff did not identify the entertainer witnesses, and did not calculate the amount  
27 it requested excluded. The Court relies on Defendants' Bill of Costs (doc. no. 95-2) and  
28 considers the deposition costs (not including costs of deposition videos, which the Clerk  
had already excluded) for the named plaintiffs in *Tanya A.*, with the exception of the  
three entertainers who did not perform at *Cheetah's* (*see* 14cv1942, doc. no. 24 at 2-3).

1 Next, Plaintiff seeks exclusion of the deposition costs for police officers. Plaintiff  
2 does not identify the officers involved in the raids on Cheetah's. Accordingly, this  
3 request lacks sufficient support, and is therefore denied.

4 Finally, Plaintiff requests exclusion of costs incurred to subpoena medical records.  
5 Unlike the plaintiffs in *Doe* and *Tanya A.*, Plaintiff did not request damages. Medical  
6 records therefore were not relevant to *Cheetah's* case, and the costs of \$1,099.83 to  
7 subpoena them are excluded.

8 In their opposition brief, Defendants request re-taxing costs in their originally  
9 requested amount. (Doc. no. 100 at 11.) Because they have not filed a motion to re-tax  
10 within 7 days of the Clerk's Order Taxing Costs, as required by Rule 54(d)(1), their  
11 request is denied. The request is denied for the alternative reason that the Clerk's stated  
12 reasons for not allowing all of the requested costs were well taken. To the extent  
13 Defendants in their opposition request attorneys' fees and non-taxable costs (doc. no. 100  
14 at 4-10), their request is denied for failure to file a motion within 14 days of entry of  
15 judgment as required by Rule 54(d)(2).

16 Defendants also filed a motion to file a sur-reply to respond to new matters raised  
17 in Plaintiff's reply and reply declaration of Steve Hoffman. The Court has not relied on  
18 Plaintiff's reply filings for any part of this order; accordingly, Defendants' motion to file a  
19 sur-reply is denied as moot.

20 For the foregoing reasons, Plaintiff's motion to deny or re-tax Clerk's taxation of  
21 costs is granted in part and denied in part. Total costs taxed in favor of City of San Diego  
22 and Shelly Zimmerman are reduced to \$14,219.24. In all other respects, Plaintiff's  
23 motion is denied. Defendants' motion to file a sur-reply is denied.

24 **IT IS SO ORDERED.**

25 Dated: September 12, 2018

26   
27 Hon. M. James Lorenz  
28 United States District Judge

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